

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

GERARD DUENAS, HAROLD GOLDMAN, In
Pro Se.

Case No: C 13-0836 SBA

Plaintiffs,

ORDER DENYING
PLAINTIFFS' EX PARTE
APPLICATION FOR A
TEMPORARY RESTRAINING
ORDER

vs.

STEVEN FREITAS, AKA STEVE
FREITAS, in his Official and
Private Capacity, SONOMA COUNTY
SHERIFF'S DEPARTMENT, KATHRYN
STRALEY, in her official and
private capacity, DOES 1-15,
Inclusive.

Defendants.

1

15 Plaintiffs Gerard Duenas and Harold Goldman, proceeding pro
16 se, bring the instant action against Defendants Sonoma County
17 Sheriff Steven Freitas, the Sonoma County Sheriff's Department
18 (SCSD), and SCSD employee Kathryn Straley, pursuant to 42 U.S.C.
19 § 1983, among other claims. Plaintiffs apply ex parte for a
20 temporary restraining order (TRO) to enjoin Defendants from
21 evicting Goldman, a former tenant of Duenas, from property
22 previously owned by Duenas. Defendants have not been served with
23 the Complaint or the application for TRO. This matter will be
24 decided on the papers that have been submitted. Having considered
25 all of the papers filed by Plaintiffs, the Court denies the
26 application for an ex parte TRO.

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1 BACKGROUND

2 Duenas is the former owner of property located at 6285
3 Highway, Santa Rosa, California. Goldman, an 82-year male,
4 previously entered into a lease agreement with Duenas for the
5 property for the period from December 3, 2009 to December 2, 2014.

6 On or about April 11, 2011, the property was sold at a non-
7 judicial foreclosure sale to Deutsche Bank National Trust Company,
8 which has not been joined as a party in this action. On a date
9 not specified in the pleadings, Deutsche Bank commenced an
10 unlawful detainer (UD) action in Sonoma County Superior Court to
11 take possession of the property. See Deutsche Bank Nat'l Trust
12 Co. v Duenas, et al., Sonoma Cnty. Super. Ct. No. MCV 21771. The
13 state court originally issued a Writ of Possession in favor of
14 Deutsche Bank on October 4, 2011, at which time it attempted to
15 evict Plaintiffs from the Property.¹

16 On February 20, 2013, the Sonoma County Superior Court issued
17 a second Writ of Possession in favor of Deutsche Bank which was
18 served on the same date. The Notice to Vacate attached to the
19 writ states that all occupants of the property must vacate the
20 premises by no later than 6:01 a.m. on February 27, 2013.

21 On February 25, 2013, Plaintiffs filed a verified Complaint
22 in this Court which alleges the following claims against
23 Defendants: (1) fraud and violation of the Fair Debt Collection
24 Practices Act (FDCPA); (2) violation of due process and
25 intentional infliction of emotional distress; (3) violation of the

26
27 ¹ It is not clear whether Duenas was residing at the property
when Deutsche Bank first attempted to enforce the Writ of
28 Possession.

1 Fourth Amendment; (4) violation of the Protecting Tenants in
2 Foreclosure Act (PTFA). Dkt. 1. Along with the Complaint,
3 Plaintiffs have filed a two-page application for a TRO which seeks
4 to enjoin Defendants from proceeding with the eviction of Goldman
5 on February 27, 2013. Dkt. 3. As noted, Plaintiffs have served
6 neither the Complaint nor the TRO application on Defendants.

LEGAL STANDARD

A temporary restraining order may be issued only if immediate and irreparable injury, loss, or damage will result to the applicant" if the order does not issue. Fed. R. Civ. P. 65(b). The same legal standard applies to an application for a TRO and a motion for a preliminary injunction. See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co., 240 F.3d 832, 839 n.7 (9th Cir. 2001). To obtain immediate injunctive relief, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that the balance of equities tips in the moving party's favor; and (4) that an injunction is in the public interest. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

Under the Ninth Circuit's "sliding scale" approach, the first and third elements of the Winter test are to be balanced such that "serious questions" going to the merits and a balance of hardships that "tips sharply" in favor of the movant are sufficient for relief so long as the other two elements are also met. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134-35 (9th Cir. 2011). Nevertheless, a preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing

1 that the plaintiff is entitled to such relief," Winter, 555 U.S.
2 at 22, and the moving party bears the burden of meeting all four
3 Winter prongs, see Cottrell, 632 F.3d at 1135; DISH Network Corp.
4 v. FCC, 653 F.3d 771, 776-77 (9th Cir. 2011).

5 DISCUSSION

6 I. Request for Ex Parte TRO

7 A TRO may be issued without notice to the adverse party or
8 its counsel only if:

- 9 A) specific facts in an affidavit or a
10 verified complaint clearly show that
11 immediate and irreparable injury, loss, or
12 damage will result to the movant before the
13 adverse party can be heard in opposition;
14 and (B) the movant's attorney certifies in
15 writing any efforts made to give notice and
16 the reasons why it should not be required.

17 Fed. R. Civ. P. 65(b)(1); N.D. Cal. Civ. R. 65-1(b).

18 There are "very few circumstances justifying the issuance of
19 an ex parte TRO." Reno Air Racing Ass'n Inc. v. McCord, 452 F.3d
20 1126, 1131 (9th Cir. 2006). For instance, notice may be excused
21 where it "is impossible either because the identity of the adverse
22 party is unknown or because a known party cannot be located in
23 time for a hearing." Id. Or, notice may not be required where
24 providing "notice to the defendant would render fruitless the
25 further prosecution of the action" because the adverse party is
26 likely to destroy evidence. Id.

27 Here, Plaintiffs have not submitted an affidavit or otherwise
28 made any showing in accordance with Rule 65-1(b) that they will
suffer immediate and irreparable harm before Defendants can be
heard in opposition to the TRO request. Likewise, Plaintiffs have
made no showing that notice should be excused due to their

1 inability to identify or locate Defendants or that providing
 2 notice would render further prosecution of the action fruitless.

3 Id. Plaintiffs' failure to satisfy the requirements for the
 4 issuance of a TRO without notice, standing alone, warrants the
 5 denial of their request for a TRO.²

6 II. Likelihood of Success

7 Even if Plaintiffs had provided notice to Defendants or
 8 satisfied the requirements for an ex parte TRO, they have failed
 9 to demonstrate a likelihood of success on the merits. The
 10 gravamen of Plaintiffs' claims is that Deutsche Bank had no legal
 11 right to foreclose on the property and therefore the Writ of
 12 Possession is void. Under the Rooker-Feldman doctrine, however,
 13 federal courts lack jurisdiction to review the propriety of state
 14 court rulings, including a Writ of Possession rendered during the
 15 course of a state court UD proceeding. See, e.g., Richards v.
 16 Mercy Hous. Cal., 2012 WL 174186, at *2 (N.D. Cal.) (denying
 17 motion for preliminary injunction which sought to enjoin eviction
 18 by the county sheriff); Drawsand v. F.F. Props., L.L.P., 866 F.
 19 Supp. 2d 1110, 1123 (N.D. Cal. 2011) ("To the extent that Drawsand
 20 is attempting to challenge the adverse ruling in the UD action,
 21 such claim is barred under the Rooker-Feldman doctrine.").

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24 ² The fact that Plaintiffs are proceeding pro se does not
 25 excuse their non-compliance with the procedural rules of this
 26 Court. See Ghazali v. Moran, 46 F.3d 52, 54 (9th Cir. 1995)
 27 ("Although we construe pleadings liberally in their favor, pro se
 28 litigants are bound by the rules of procedure.") (per curiam);
Swimmer v. IRS, 811 F.2d 1343, 1344 (9th Cir. 1987) ("[i]gnorance
 of court rules does not constitute excusable neglect, even if the
 litigant appears pro se.") (citation omitted).

1 Jurisdictional flaws aside, Plaintiffs have not shown that
 2 their claims have any substantive merit. Goldman, the party most
 3 directly affected by the impending eviction, alleges that he is
 4 protected under the PTFA. Compl. ¶ 2. The PTFA requires any
 5 party acquiring an interest in property through foreclosure to
 6 provide existing tenants with ninety days' notice to vacate. See
 7 Pub. L. No. 111-22, tit. VII, § 702, 123 Stat. 1632, 1660-61
 8 (2009). Plaintiffs do not allege that Deutsche Bank--which is not
 9 a party to the action--failed to provide the requisite notice.
 10 See Compl. ¶¶ 123-24. In any event, Congress did not create a
 11 private right of action to enforce the PTFA. See Miller v. Chase
 12 Home Fin., LLC, 677 F.3d 1113, 1116 (11th Cir. 2012); Nat'l Trust
 13 Co. v. Eaddy, 2012 WL 4173987, at * 1 (N.D. Cal.); Nativi v.
 14 Deutsche Bank Nat'l Trust Co., 2010 WL 2179885 (N.D. Cal.). As
 15 for Duenas, he no longer owns the property and thus lacks standing
 16 to challenge Goldman's eviction.

17 Plaintiffs also have failed to allege any viable claims
 18 against Defendants. Defendants' only role in the matter is that
 19 they served the Writ of Possession at the property address.
 20 Plaintiffs allege that in doing so Defendants are attempting to
 21 seize the property without a warrant in violation of the Fourth
 22 Amendment. Compl. ¶¶ 10, 18. Under California law, however, "a
 23 writ of possession may be effectuated without a warrant." Busch
 24 v. Torres, 905 F. Supp. 766, 772 (C.D. Cal. 1995) (citing People
 25 v. Jackson, 117 Cal. App. 3d 654, 658 (1981)).

26 Finally, Plaintiffs' likelihood of success is undermined by
 27 their failure to join Deutsche Bank, the real party in interest,
 28 as a defendant. Almost all of the allegations of misconduct are

1 directed at Deutsche Bank, which instituted the UD proceeding and
2 obtained the Writ of Possession that Plaintiffs now allege is
3 void. E.g., Compl. ¶ 44. Since any effort to challenge the
4 viability or enforceability of the Writ of Possession necessarily
5 affects the rights of Deutsche Bank, the owner of the property,
6 the action is likely subject to dismissal under Federal Rule of
7 Civil Procedure 19(a) for failure to join a required party.

8 Paiute-Shoshone Indians of Bishop Cnty. of Bishop Colony, Cal.,
9 637 F.3d 993, 997 (9th Cir. 2011).

10 III. Irreparable Harm

11 The loss of one's home through foreclosure generally is
12 considered sufficient to establish irreparable harm. Gonzalez v.
13 Wells Fargo Bank, 2009 WL 3572118 at *3 (N.D. Cal.). Nonetheless,
14 a TRO is not warranted, where, as here, Plaintiffs have a marginal
15 probability of succeeding on their claims. See Washington v.
16 Nat'l City Mortg. Co., 2010 WL 5211506, at *6 (N.D. Cal.) (denying
17 motion for TRO to enjoin foreclosure "given [plaintiffs'] failure
18 to establish any likelihood of success on the merits.").

19 CONCLUSION

20 For the reasons stated above,

21 IT IS HEREBY ORDERED THAT:

- 22 1. Plaintiffs' ex parte application for a TRO is DENIED.
23 2. This Order terminates Docket No. 3.

24 IT IS SO ORDERED.

25 Dated: February 26, 2013


For
SAUNDRA BROWN ARMSTRONG
United States District Judge